89

Supreme Court, U.S.
FILED
071248 APR 1 - 2008
OFFICE OF THE CLERK

(1)

No. 08-

IN THE
Supreme Court of the United States

DARNYELL R. RHOADES, SPECIALIST,
UNITED STATES ARMY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER J. O'BRIEN
Colonel, United States Army
Chief, Defense Appellate Division

STEVEN C. HENRICKS
Lieutenant Colonel,
United States Army
Deputy Chief,
Defense Appellate Division

SEAN F. MANGAN
Major,
United States Army
Council of Record
U.S. Army Legal
Services Agency
901 N. Stuart St.,
Suite 340
Arlington, VA 22203
(703) 588-6047

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces properly held that a military judge, in granting a government motion to disqualify petitioner's civilian counsel on the basis of an alleged violation of the 18 U.S.C. § 207(a)(2), denied petitioner his Sixth Amendment right to civilian counsel of his choice.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW. 1

JURISDICTION. 1

CONSTITUTIONAL PROVISION INVOLVED . . . 2

STATUTE INVOLVED. 2

ETHICAL RULES INVOLVED. 6

STATEMENT OF THE CASE. 7

Procedural History. 7
Statement of Facts. 9

REASONS FOR GRANTING THE WRIT 12

CONCLUSION. 16

APPENDIX A
United States Court of Appeals for the Armed Forces Opinion 1a

United States Army Court of Criminal Appeals Opinion 14a

TABLE OF AUTHORITIES

CASES: *Page(s)*

Powell v. Alabama, 287 U.S. 45 (1932) 13

United States v. Gonzalez-Lopez, 126 S. Ct. 2557 (2006) 13

Wheat v. United States, 486 U.S. 153 (1988) 12, 13, 14, 16, 19, 20

United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008) 17, 19

CONSITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES:

U.S. CONST. amend. VI 2

18 U.S.C. § 207(a) 2, 12, 17

18 U.S.C. § 207(a)(1) 15

18 U.S.C. § 207(a)(2) . . . 12, 14, 15, 16, 17, 18, 20, 21

Rule 1.11, Ariz. R. of Prof. Cond. (2003) 6, 15

Rule 1.11, Army Regulation (AR) 27-26 "Rules of Professional Conduct for Lawyers" (May 1, 1992) 7, 15

MISCELLANEOUS:

Sen. Rep. No. 170, 95th Cong., 2d sess. 32 (1977) 18, 20

IN THE

Supreme Court of the United States

DARNYELL R. RHOADES, SPECIALIST,
United States Army, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, Darnyell R. Rhoades, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 65 M.J. 393 (C.A.A.F. 2008) (Appendix A). The decision of the United States Army Court of Criminal Appeals is unpublished (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on January 9, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3), the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3); 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

STATUTE INVOLVED

This case also involves 18 U.S.C. § 207(a):

§ 207. Restrictions on former officers, employees, and elected officials of the executive and legislative branches.
(a) Restrictions on all officers and employees of the executive branch and certain other agencies.
(1) Permanent restrictions on representation on particular matters. Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title [18 USC § 216].

(2) Two-year restrictions concerning particular matters under official responsibility. Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of

Columbia, and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title [18 USC § 216].

(3) Clarification of restrictions. The restrictions contained in paragraphs (1) and (2) shall apply--

(A) in the case of an officer or employee of the executive branch of the United States (including any independent agency), only with respect to communications to or appearances before any officer or employee of any department, agency, court, or court-martial of the United States on behalf of any other person (except the United States), and only with respect to a matter in which the United States is a party or has a direct and substantial interest; and

(B) in the case of an officer or employee of the District of Columbia, only with respect to communications to or appearances before any officer or employee of any department, agency, or court of the District of Columbia on behalf of any other person (except the District of Columbia), and only with respect to a matter in which the District of Columbia is a party or has a direct and substantial interest.

ETHICAL RULES INVOLVED

This case also involves Rule 1.11 of the Arizona Rules of Professional Conduct (2003):

> ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.
> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

This case also involves Rule 1.11 of Army Regulation (AR) 27-26 "Rules of Professional Conduct for Lawyers" (May 1, 1992):

RULE 1.11 Successive Government and Private Employment.

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless;

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate Government agency to enable it to ascertain compliance with the provisions of this Rule.

STATEMENT OF THE CASE

Procedural History

On October 28-29, December 9, 2003, and on January 27-29, 2004, petitioner was tried at a general court-martial by a panel of officer and enlisted service members at Fort Huachuca, Arizona. The panel convicted petitioner, contrary to his pleas, of three specifications of willful disobedience of a superior commissioned officer in violation of Uniform Code of Military Justice

BEST AVAILABLE COPY

(UCMJ) Article 90; 10 U.S.C. § 890 (2002), but acquitted petitioner of charged UCMJ violations alleging rape, larceny of military property, and kidnapping. The panel sentenced petitioner to confinement for twelve months, reduction to the grade of Private (E-1) and a bad-conduct discharge. The convening authority, in an effort to address dilatory post-trial processing, approved only so much of the adjudged sentence as provided for confinement for eleven months, reduction to the grade of Private (E-1), and a bad-conduct discharge, and credited petitioner with 255 days against the sentence to confinement.

On November 16, 2006, the Army Court of Criminal Appeals summarily affirmed the findings of guilty and the sentence. On June 6, 2007, the United States Court of Appeals for the Armed Forces (CAAF) granted review of the following issue:

> DID THE MILITARY JUDGE, IN GRANTING THE GOVERNMENT'S MOTION TO DISQUALIFY APPELLANT'S CIVILIAN COUNSEL ON THE BASIS OF AN ALLEGED VIOLATION OF THE ETHICS IN GOVERNMENT ACT (18 U.S.C. 207(a)(2)), DENY THE APPELLANT HIS SIXTH AMENDMENT RIGHT TO CIVILIAN COUNSEL OF HIS CHOICE?

The CAAF rendered its opinion on January 9, 2008, affirming the decision of the Army Court of

Criminal Appeals. The CAAF held that the decision by the military judge to disqualify petitioner's civilian defense counsel did not violate petitioner's right to counsel of choice under the Sixth Amendment.

Statement of Facts

Petitioner was originally charged with fraudulent enlistment, disobeying the order of a superior commissioned officer, rape, larceny of military property in excess of $500.00, and kidnapping. Charges were preferred on July 9, 2003, and were served on petitioner, who had been in pretrial confinement since July 4, 2003. Petitioner was subsequently charged with two additional violations of disobeying the order of a superior commissioned officer. The additional charges were preferred on August 6, 2003, and were subsequently served on petitioner, who remained in pretrial confinement through the date of trial. Referral of both the original and additional charges occurred on October 8, 2003. The fraudulent enlistment charge was dismissed prior to arraignment.

Petitioner was arraigned on October 28, 2003, and announced that he wished to be represented by Mr. D. Chris Russell, Esq., and by his detailed military defense counsel. On October 29, 2003, petitioner executed an affidavit expressing this desire, explaining that he had considered other counsel in the area and found that no other civilian defense counsel were available and/or acceptable to represent him. Petitioner concluded the affidavit by

identifying Mr. Russell as the counsel of his choice and by waiving "any potential conflict of interest under Rules 1.7, 1.9, 1.10, and 1.11 of the Rules of Professional Conduct for Lawyers." That same day, arguments were heard in an UCMJ Article 39(a) session regarding a motion to disqualify Mr. Russell brought by the government.

Mr. Russell had formerly served as an active-duty Army Judge Advocate in the grade of Captain (CPT, O-3). Mr. Russell had been released from active duty on September 14, 2003, following a period of terminal leave that began on July 1, 2003. Prior to July 1, 2003, then-CPT Russell had served as the chief of military justice for the Office of the Staff Judge Advocate (OSJA), Fort Huachuca, Arizona, a position he had held since June 9, 2002. Among other duties involved in this position, Mr. Russell had managed the daily operations of the OSJA's military justice division, supervised trial counsel and other military justice personnel, and provided advice to Criminal Investigation Division (CID) agents and other military law enforcement personnel.

On June 15, 2003, then-CPT Russell received an email from petitioner's company commander, CPT Barton, requesting advice about a CID summary on misconduct allegedly committed by petitioner. This misconduct included some, but not all, of the charges brought to trial, as well as other alleged misconduct. Then-CPT Russell was, at that time, two days away from trial in his final case as a military prosecutor. Accordingly, he forwarded the

email containing the CID summary to his successor, CPT Ford, who was already working at the Fort Huachuca OSJA. In forwarding the email, then-CPT Russell remarked to CPT Ford that there appeared to be a confession, and suggested that CPT Ford "test the quality of the confession [before] making a recommendation." Later, while on terminal leave, Mr. Russell was contacted by the Special Agent in Charge (SAC) of the Fort Huachuca CID office, Special Agent (SA) Smith. SA Smith, unsuccessful in efforts to contact the current military justice personnel, had called Mr. Russell about new allegations reported against petitioner. During this brief conversation, Mr. Russell learned some basic details about the alleged misconduct and advised SA Smith on the elements of kidnapping. Mr. Russell had no other involvement in the case, and at no time did he review any of the evidence against petitioner or receive confidential government information about the case. All substantive advice to CID in petitioner's case was provided by CPT Ford and the prosecuting trial counsel, CPT Deichert. After passing the Arizona bar and completing his terminal leave, Mr. Russell was retained as petitioner's civilian counsel, entering a notice of appearance on October 23, 2003.

The government filed a motion for appropriate relief, dated October 27, 2003, to disqualify Mr. Russell from representing petitioner before the court-martial, on the basis that such representation would violate 18 U.S.C. § 207(a). The government argued that Mr. Russell's position as supervisor of the OSJA military justice division, while petitioner's

case was under investigation by CID, prevented him from representing petitioner at trial because such representation would violate 18 U.S.C. §207(a)(2). The government pointed to the relevant phone and email communications, as well as then-CPT Russell's regular duties as the supervising prosecutor, in support of its motion.

In granting the government's motion to disqualify petitioner's civilian counsel of choice, the military judge referenced the main purpose behind 18 U.S.C. § 207(a)(2): the interest in eliminating adverse public perception regarding successive public and private representation. Citing *Wheat v. United States*, the military judge concluded that "the Sixth Amendment right to counsel of choice is not without limitation, particularly when counsel of choice has a 'previous or ongoing relationship with an opposing party, even when the opposing party is the Government.'" *Wheat v. United States*, 486 U.S. 153, 159 (1988)."

REASONS FOR GRANTING THE WRIT

Petitioner sought to exercise his constitutional right to representation by counsel of choice. He was denied that right on the basis of a federal criminal statute intended to generally improve the public perception of government. This disqualification was upheld by the CAAF, despite the fact that such a disqualification is unsupported by any ethical rule, decision of this Court or any other federal appellate court, or logic itself.

The right to counsel of one's choice is one of

Constitutional magnitude, protected by the Sixth Amendment. *Powell v. Alabama*, 287 U.S. 45, 53 (1932)("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice"); As recently as 2006, the Court affirmed this important right in *United States v. Gonzalez-Lopez,* stating, "We have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez,* 126 S. Ct. 2557, 2561 (2006). That decision affirmed the significance of the right, the limits of which had been discussed by the Court nearly twenty years earlier in *Wheat v. United States*, 486 U.S. 153, 159 (1988)(holding that the right to select and be represented by a preferred attorney is not absolute). In *Gonzalez-Lopez,* the Court re-emphasized the fundamental nature of this protection, holding, "The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez,* 126 S. Ct. at 2562 (2006). Further, this Court concluded that "erroneous deprivation of the right to counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error." *Id.* at 2565.

The Sixth Amendment right to counsel of choice is not absolute. In *Wheat v. United States*, the Court discussed the limits of this important right:

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government.

Wheat v. United States, 486 U.S. 153, 159 (1988).

The military judge's decision to grant the government's motion and disqualify Mr. Russell was made on the basis that Mr. Russell's prior military duties triggered 18 U.S.C. § 207(a)(2). That statute prevented Mr. Russell, for a period of two years, from representing any individual who had a particular matter pending under Mr. Russell's official responsibility within the last year of his service. In its motion, the government stipulated that Mr. Russell did not "personally and substantially" participate in the government case against petitioner such as would form a basis for permanent disqualification under 18 U.S.C. §207(a)(1). This clarified that the government was not alleging an actual conflict of interest as defined

by the applicable ethical rules governing representation and conflicts of interest.

Petitioner concedes that Mr. Russell's representation would, in fact, violate 18 U.S.C. § 207(a)(2). This, along with the government's concession that § 207(a)(2), and no other provision of § 207, was triggered by the representation, ensures that this case is not fact-bound, making the issue before the Court purely one of law.

As a civilian attorney licensed in Arizona, representing an accused Soldier at a court-martial, Mr. Russell was subject to both his state's ethical rules and the "Rules of Professional Conduct for Lawyers" promulgated in Army Regulation (AR) 27-26 (May 1, 1992). As a former Army Judge Advocate representing an individual party opposite the United States, Mr. Russell's representation was governed by Rule 1.11 of both authorities, the provisions of which are substantially identical. Both rules prohibit representation of a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. This permanent prohibition mirrors the "[p]ermanent restrictions on representation on particular matters" codified in 18 U.S.C. § 207(a)(1). Effectively, the government conceded that there was no conflict of interest as defined by the applicable ethical rules.

The disqualification of petitioner's counsel rests solely on an alleged violation of 18 U.S.C. § 207(a)(2). This provision, unlike § 207(a)(1), does

not permanently bar representation of a certain party on the basis of an attorney's prior government service. Instead, it merely prohibits a former government employee from private representation of parties in certain matters, and imposes that prohibition only for a period of two years. Further, unlike the section that precedes it, § 207(a)(2) does not match the provisions of any ethical rule.

The ruling by the military judge fell outside all recognized grounds for disqualifying an accused's selected counsel. The right to counsel of choice does not extend to appointed counsel, but petitioner retained Mr. Russell at his own expense. *See Wheat*, 486 U.S. at 159 (1988). A trial judge may properly disqualify a person who was not a member of the bar, but Mr. Russell's qualifications were defect-free. *Id.* Nothing in the record outside the analysis of 18 U.S.C. § 207(a)(2) establishes a conflict of interest, and petitioner waived such conflicts at the outset. The Court has "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar," *Gonzales-Lopez* at 2566, but neither was a factor in this military judge's ruling. Finally, the Court has recognized the that courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat* at 160. But no Arizona or Army ethical standard would have been violated by Mr. Russell's representation of petitioner, save the effects of the criminalization of

that same representation by 18 U.S.C. § 207(a)(2).

In reviewing petitioner's case, the CAAF determined that the central question in petitioner's case is "whether the particular circumstances of Mr. R's prior federal government service . . . provided a sufficient basis for the military judge to disqualify Mr. R from serving as Appellant's defense counsel." *United States v. Rhoades*, 65 M.J. 393, 394 (C.A.A.F. 2008). This question reveals the flaw in the CAAF's analysis. The central issue is not, as the CAAF suggests, whether the particular facts support a finding that Mr. Russell's representation would violate 18 U.S.C. § 207(a)(2). The ultimate issue is whether representation in violation of that statute is a sufficient basis to deny a criminal defendant his right to counsel of choice where no actual conflict exists under the applicable ethical rules.

Congress adopted § 207(a) as a part of the Ethics in Government Act of 1978 in an effort to boost public confidence in government:

> 18 U.S.C. § 207, like other conflict of interest statutes, seeks to avoid even the appearance of a public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even

> the appearance of conflict of interest. .
> . .

Sen. Rep. No. 170, 95th Cong., 2d sess. 32 (1977), reprinted in *1978 U.S. Code Cong. & Ad. News*, 4216 at 4248. While Congress has a legitimate interest in bolstering the public's confidence in government, it cannot further that interest in such a way that needlessly circumscribes such a fundamental right as recognized by the Court in *Gonzalez-Lopez*. When viewed in light of its congressional purpose, 18 U.S.C. § 207(a)(2) most effectively applies where government expenditures and the potential for private monetary gain come into play. In the context of a criminal trial, a statute that undercuts such a basic right is self-defeating as a measure to bolster public confidence in governmental fairness. When applied in the context of criminal proceedings, the statute's infringement on constitutional protection is without sufficient justification.

Perhaps the best way to see why 18 U.S.C. § 207(a)(2) alone does not justify disqualification of a criminal defendant's counsel of choice is to consider the inconsistent results the statute allows. Because of the temporary nature of the restriction, a defendant might, should his case drag on for months, be later able to retain the same attorney previously disqualified under the statute. Additionally, that same counsel, although disqualified at trial, could, without violating the statute, represent the same client on appeal, once two years had passed since the date of that

attorney's end of government service. It is impossible to ascertain how the interest of bolstering public confidence in government can be rationally achieved in such inconsistency, even if it were arguably served by denying a criminal defendant his counsel of choice. When considered in light of the varying amounts of time that criminal cases take in moving to trial, the statute appears even less consistent, effective, or meaningful. Criminal defendants whose cases are not brought to trial for two years receive the benefit of potential representation by former government counsel who had official responsibility over that particular matter, while criminal defendants investigated quickly and tried promptly do not have the same advantage.

In deciding petitioner's case, the CAAF focused on the "reasonable likelihood that Mr. R's representation of Appellant at trial would violate a statute designed to protect the integrity of government functions, including trial proceedings." *Rhoades,* 65 M.J. at 398. The court then made the illogical leap that Mr. Russell's "continued representation created 'a serious potential for conflict,' which provided a sufficient basis for the military judge to refuse Appellant's waiver of conflict-free representation." *Id., citing Wheat, 486 U.S. at 164.*

The CAAF's attempt to link the statutory violation with the *Wheat* decision is flawed. In *Wheat,* the trial judge faced multiple criminal defendants in related cases seeking representation

from the same counsel. Although Mr. Wheat attempted to waive the conflicting representation, the trial judge refused to accept the waiver. *Wheat* at 159. The Court upheld that decision, noting that, although no actual conflict existed at the moment of the trial judge's decision, "a potential for conflict exist[ed] which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163. The Court went on to detail how, potentially, actual conflicts could arise in the trial of Mr. Wheat or his co-defendants that would interfere with effective representation of one or more defendants. *Id.* at 164.

By citing the "potential for conflict" language in *Wheat*, the CAAF opinion confuses two distinct and separate concepts: the potential for conflict and the appearance of conflict. In cases like *Wheat*, one attorney's representation of multiple defendants creates the possibility that, at some point, the attorney's duty to one client will interfere with the representation of another. Thus, a potential for conflict exists. In cases involving only an appearance of conflict, no such possibility is involved. Instead, the nature of one attorney's representation leads an outside observer to believe that the representation comes at the expense of the attorney's duty to some other party or principle. Petitioner's case is an example of the latter. 18 U.S.C. § 207(a)(2) guards against the "appearance of a public office being used for personal or private gain." Sen. Rep. No. 170, 95th Cong., 2d sess. 32 (1977), reprinted in *1978 U.S. Code Cong. & Ad. News*, 4216 at 4248. In petitioner's case, no

potential existed for Mr. Russell's representation to put him at odds with another client, past or present. In fact, the only "potential" conflict discussed in the CAAF opinion was the potential that Mr. Russell's representation might violate the relevant statute. There was no evidence that any other party, including the government, would suffer any prejudice as the result of Mr. Russell's representation of petitioner. Affirmatively, the CAAF's reliance on *Wheat* was incorrect.

The Sixth Amendment guarantees each criminal defendant the right to counsel of choice. While a trial judge may properly disqualify a retained defense counsel on the basis of a conflict of interest arising from that attorney's prior government representation, such is not the case where the disqualification is made only under the provisions of 18 U.S.C. § 207(a)(2). Such a disqualification, made solely on the basis of a statute intended to generally improve public perception of government by regulating appearances, prevents no conflict of interest, actual or potential. The inconsistent effects of 18 U.S.C. § 207(a)(2) on a criminal defendant's ability to exercise his right to counsel of choice undermines any argument that such a prohibition is warranted. In the context of a criminal trial, 18 U.S.C. § 207(a)(2) cannot constitutionally preclude the criminal defendant from exercising his right to counsel of choice. The disqualification of Mr. Russell, even when weighed against the need for public confidence in government, was constitutional structural error.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court set aside the findings of guilty and remand the case for a rehearing.

Respectfully submitted,

CHRISTOPHER J. O'BRIEN
Colonel, United States Army
Chief, Defense Appellate Division

STEVEN C. HENRICKS
Lieutenant Colonel,
United States Army
Deputy Chief,
Defense Appellate Division

SEAN F. MANGAN
Major,
United States Army
Council of Record
U.S. Army Legal
Services Agency
901 N. Stuart St.,
Suite 340
Arlington, VA 22203
(703) 588-6047

Counsel for Petitioner

APPENDIX A

IN THE CASE OF
UNITED STATES, Appellee

V.

Darnyell R. RHOADES
Specialist
U.S. Army, Appellant

No. 07-0173
Crim. App. No. 20040109

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Argued October 17, 2007
Decided January 9. 2008

EFFRON, C.J., delivered the opinion of the Court, in which BAKER, ERDMANN, STUCKY, and RYAN, JJ., joined.

Military Judge: Mark P. Sposato.

Chief Judge EFFRON delivered the opinion of the Court.

The present appeal concerns a general court-martial convened at Fort Huachuca, Arizona. The court-martial, composed of officer and enlisted members, convicted Appellant, contrary to his pleas, of three specifications of willful disobedience of a superior commissioned officer, in violation of Article

90, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 890 (2000)*. The sentence adjudged by the court-martial included a bad-conduct discharge, confinement for one year, and reduction to the lowest enlisted grade. The convening authority approved that portion of the sentence that provided for the bad-conduct discharge, reduction to the lowest enlisted grade, and confinement for eleven months. The United States Army Court of Criminal Appeals affirmed. *United States v. Rhoades*, No. ARMY 20040109 (A. Ct. Crim. App. Nov. 16, 2006) (unpublished).

On Appellant's petition, we granted review of the following issue:

> DID THE MILITARY JUDGE, IN GRANTING THE GOVERNMENT'S MOTION TO DISQUALIFY APPELLANT'S CIVILIAN COUNSEL ON THE BASIS OF AN ALLEGED VIOLATION OF THE ETHICS IN GOVERNMENT ACT (*18 U.S.C. [§] 207(a)(2)*), DENY THE APPELLANT HIS *SIXTH AMENDMENT* RIGHT TO CIVILIAN COUNSEL OF HIS CHOICE?

For the reasons set forth below, we conclude that the decision by the military judge to disqualify Appellant's civilian defense counsel did not violate Appellant's right to counsel of choice under the *Sixth Amendment*.

I. BACKGROUND

Appellant, who faced a court-martial at Fort

Huachuca, retained Mr. R to serve as civilian defense counsel. Immediately prior to entering private practice, Mr. R served as an active-duty judge advocate at Fort Huachuca, including duty as the Chief of Military Justice. In that position, Mr. R supervised junior trial counsel and provided advice to military commanders and agents of the Army's Criminal Investigation Division (CID).

A month after his release from active duty, Mr. R entered a special appearance on behalf of Appellant. The Government moved to disqualify Mr. R as counsel, focusing primarily on matters concerning the CID investigation of Appellant during the period in which Mr. R had served as a judge advocate. The military judge granted the motion.

The granted issue raises the question of whether the particular circumstances of Mr. R's prior federal government service, as set forth in section II, *infra,* provided a sufficient basis for the military judge to disqualify Mr. R from serving as Appellant's defense counsel.

A. *Selection and Disqualification of Counsel*

The accused in a criminal proceeding has the right to "the Assistance of Counsel for his defence." *U.S. Const. amend. VI.* Under the UCMJ, an accused has the right to representation by military counsel provided at no expense to the accused. Article 38(b)(3), UCMJ, *10 U.S.C. § 838(b)(3) (2000).* The accused may be represented by civilian counsel. *See Article 38(b)(2), (b)(4), UCMJ.*

The right to counsel of choice under the *Sixth Amendment*, as well as under the UCMJ, is not absolute. *Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)*; *United States v. Beckley, 55 M.J. 15, 23-24 (C.A.A.F. 2001)*. The "'need for fair, efficient, and orderly administration of justice'" may outweigh the interest of the accused in being represented by counsel of choice. *United States v. Campbell, 491 F.3d 1306, 1310 (11th Cir. 2007)* (quoting *United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994)*); *see also United States v. MacCulloch, 40 M.J. 236, 238-39 (C.M.A. 1994)*. For example, disqualification of a defendant's chosen counsel due to a "previous or ongoing relationship with an opposing party, even when the opposing party is the Government," does not violate the *Sixth Amendment*. *Wheat, 486 U.S. at 159*.

In the military justice system, a person serving as civilian counsel must be a "member of the bar of a Federal court or of the bar of the highest court of a State." Rule for Courts-Martial (R.C.M.) 502(d)(3)(A). Alternatively, a person can serve as defense counsel if otherwise authorized to practice law by a recognized licensing authority and determined to be qualified by the military judge. R.C.M. 502(d)(3)(B). Under R.C.M. 502(d)(4), a person may not serve as defense counsel if the person is or has been the accuser, an investigating officer, a military judge, or a court-martial member, subject to express waiver by the accused. In addition, "[n]o person who has acted as counsel for a party may serve as counsel for an opposing party in the same case." *Id.*; *see* Article 27(a)(2), UCMJ, *10*

U.S.C. § 827(a)(2) (2000). The disqualifications listed in R.C.M. 502(d)(4) are not exclusive, and counsel may be disqualified based upon otherwise applicable standards of professional responsibility. *See Beckley, 55 M.J. at 23-24; cf. Wheat, 486 U.S. at 160* ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

At the outset of the trial, defense counsel must advise the court as to whether "counsel has acted in any matter which might tend to disqualify the counsel." R.C.M. 901(d)(2). Under R.C.M. 901(d)(3), "[i]f it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action."

The military judge must rule on a disqualification motion prior to trial on the merits. Because it may be difficult at that stage to assess with precision whether, or to what extent, the grounds for disqualification could affect the trial, the military judge is afforded broad discretion in ruling on disqualification motions. *See Wheat, 486 U.S. at 162-63; United States v. Sparks, 29 M.J. 52, 58-59 (C.M.A. 1989).* Even when an accused is willing to waive a disqualification, the military judge has substantial latitude in deciding whether to accept the waiver. *Sparks, 29 M.J. at 58-59.* The Supreme Court has held that courts "must recognize a presu ption in favor of [an accused's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a

showing of a serious potential for conflict." *Wheat, 486 U.S. at 164.*

B. *Disqualification Based Upon Prior Government Service*

In addition to the statutory and professional standards of responsibility that apply expressly to attorneys, federal law establishes limitations on representation that apply to government personnel generally, including members of the armed forces. These limitations, including post-government employment restrictions, address situations in which Congress has identified the potential for actual or apparent conflicts of interest. *See* S. Rep. No. 95-170, at 32 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4248.

Statutory post-government employment restrictions vary considerably, depending on the nature of the issue, the level of the responsibility exercised during the person's government service, and the specific nature of the person's involvement on a given issue. *See, e.g., 18 U.S.C. § 207(b) (2000)* (one-year post-government employment restriction on persons who participated personally and substantially in certain trade or treaty negotiations); *§ 207(c)* (one-year post-government employment restriction on certain agency communications by designated senior executive branch personnel).

All executive branch officials, regardless of grade, are subject to the restrictions in *18 U.S.C. § 207(a)(1)*, a criminal statute, entitled "Permanent

restrictions on representation on particular matters." *Section 207(a)(1)* prohibits a variety of post-government employment activities, including making an appearance before a court-martial, "in connection with a particular matter . . . in which the person participated personally and substantially" as a government official and "which involved a specific party or specific parties at the time of such participation." *18 U.S.C. § 207(a)(1).*

The present case involves *18 U.S.C. § 207(a)(2),* entitled "Two-year restrictions concerning particular matters under official responsibility." *Section 207(a)(2)* makes it a crime to engage in certain post-government employment activities, including an appearance before a court-martial, "in connection with a particular matter" which the person "knows or reasonably should know was actually pending under his or her official responsibility . . . within a period of 1 year before the termination of his or her [government] service" and "which involved a specific party or specific parties at the time it was so pending." *18 U.S.C. § 207(a)(2)(B)-(C).*

The term "official responsibility" means "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." *18 U.S.C. § 202(b) (2000).* According to the implementing regulations issued by the Office of Government Ethics, the scope of an employee's official responsibility "is determined by those areas assigned by statute, regulation, Executive Order, job

description or delegation of authority." *5 C.F.R. § 2637.202(b)(2) (2007).* Under the regulations, a matter is "actually pending" once it is "referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been." *5 C.F.R. § 2637.202(c).*

II. THE MILITARY JUDGE'S DECISION TO DISQUALIFY APPELLANT'S CIVILIAN DEFENSE COUNSEL

At trial, the prosecution moved to disqualify Mr. R from serving as Appellant's civilian defense counsel on the grounds that his participation would fall within the two-year restriction of *18 U.S.C. § 207(a)(2).* The prosecution contended that the court-martial concerned a "particular matter" under the statute that was "actually pending" under Mr. R's official responsibility during the one-year period prior to the termination of his military service. The prosecution expressly stated that for purposes of the motion, the Government did not assert that Mr. R had participated "personally and substantially" in the matter at issue in violation of the permanent ban on representation under *18 U.S.C. § 207(a)(1).*

In support of the motion, the prosecution submitted various documents, including an affidavit from the staff judge advocate at Fort Huachuca detailing then-Captain R's duties as Chief of Military Justice, an affidavit from a CID agent describing interactions between CID agents and then-Captain R, and an affidavit from the Ethics Counselor at Fort Huachuca describing his review of

Mr. R's post-government employment situation in connection with the current case.

Mr. R entered a special appearance to contest the Government's disqualification motion. He filed a response to the motion and submitted an affidavit, describing his responsibilities as Chief of Military Justice and his involvement in the present case prior to the termination of his military service. He also submitted a document signed by Appellant entitled "Waiver of Conflict of Interest" in which Appellant requested representation by Mr. R and waived any conflict.

The military judge conducted a pretrial session under Article 39(a), UCMJ, *10 U.S.C. § 839(a) (2000)*, in which both parties presented their views on the disqualification motion. The military judge granted the motion and entered detailed written findings of fact and conclusions of law.

In his findings of fact, the military judge found that Mr. R's job responsibilities as Chief of Military Justice included supervising and training junior trial counsel, as well as advising CID agents and military commanders on military justice matters. In addition, the military judge found that the Fort Huachuca CID office began investigating Appellant in April 2003 for numerous offenses, including larceny of government property, an offense later referred against Appellant.

The military judge found that on June 13, 2003, a CID agent sent a status report on the investigation to Appellant's company commander. Two days later, the company commander forwarded

this report to Mr. R and the trial counsel responsible for Appellant's company. In this e-mail, the company commander wrote that he was seeking "advise [sic] on [Appellant's] case." Mr. R then e-mailed the CID status report to the judge advocate who was set to take over the Chief of Military Justice position on July 1, 2003. Mr. R advised the incoming Chief of Military Justice to review the attached status report, and further stated: "Note the confession. Advise you to test the quality of the confession [before] making a recommendation." The military judge found that Mr. R's message was directed principally at the incoming chief but also was sent to Appellant's company commander and two trial counsel in the Military Justice Division. Two weeks later, while Mr. R was on terminal leave, a CID agent investigating additional allegations against Appellant contacted Mr. R to discuss whether a kidnapping charge could be brought against Appellant. The military judge found that during this conversation, Mr. R learned the general facts of the case and advised the agent on the elements of kidnapping, an offense later referred against Appellant.

The military judge concluded as a matter of law that *18 U.S.C. § 207(a)(2)* prohibited Mr. R from representing Appellant in the present case. The military judge noted Mr. R's authority as Chief of Military Justice, concluding that Mr. R was performing his assigned responsibilities when he advised his designated successor regarding Appellant's confession and discussed the elements of kidnapping with a CID agent. In that context, the military judge found that Mr. R possessed official

responsibility over the Military Justice Division during CID's active investigation of Appellant. The military judge also observed that the Government had a substantial interest in prohibiting conduct that could interfere with prosecutorial discretion. In addition, the military judge concluded that disqualifying Mr. R would not impermissibly infringe Appellant's *Sixth Amendment* right to counsel of choice.

III. DISCUSSION

We review a military judge's decision on a motion to disqualify counsel for an abuse of discretion. *United States v. Strother, 60 M.J. 476, 478 (C.A.A.F. 2005).* The military judge's ruling will be overturned only if the findings of fact are clearly erroneous or the decision is influenced by an erroneous interpretation of the law. *United States v. Quintanilla, 63 M.J. 29, 35 (C.A.A.F. 2006).* Appellant has not demonstrated that the military judge's findings of fact as to the essential underlying events were clearly erroneous. The primary disagreement between the parties is whether the military judge erred in concluding that the facts provided an adequate basis for finding under the statute that the "particular matter" at issue in Appellant's court-martial was "actually pending under" Mr. R's "official responsibility" as Chief of Military Justice. *See 18 U.S.C. § 207(a)(2)(B).*

In view of the broad discretion afforded a military judge when acting on a pretrial disqualification motion, the military judge is not required to determine whether there is proof beyond

a reasonable doubt that the attorney is guilty of a criminal violation of *18 U.S.C. § 207(a)(2)*. We conclude that a record that demonstrates a reasonable likelihood that counsel's representation would violate a statutory post-employment restriction designed to protect the integrity of trial proceedings is sufficient to show "a serious potential for conflict" that may overcome the presumption in favor of the accused's counsel of choice. *Wheat, 486 U.S. at 164*. Under such circumstances, the military judge has discretion to disqualify counsel. *See Campbell, 491 F.3d at 1310*; *In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 250-51 (2d Cir. 1986)* (recognizing that the right to counsel of choice can be outweighed by an interest in the integrity of the judicial system); *cf. Wheat, 486 U.S. at 159* (stating that a trial judge may refuse a defendant's waiver of conflict-free representation where defense counsel has a "previous or ongoing relationship with an opposing party"); *Kessenich v. Commodity Futures Trading Comm'n, 221 U.S. App. D.C. 314, 684 F.2d 88, 99 (D.C. Cir. 1982)* (observing, in a civil case, that "the possibility that continued representation may be illegal militates strongly in favor of disqualification in order to maintain the integrity of this court's processes").

In the present case, the military judge found that the official responsibilities of Mr. R while in government service included providing advice on pending cases to CID agents and to other military attorneys. The military judge also found that Mr. R provided such advice with respect to the investigation of Appellant that led to the charges at issue in the present appeal. These events took place

within the statutory one-year period before the termination of Mr. R's military service, and the court-martial occurred within the statutory two-year period after the termination of his service. *See 18 U.S.C. § 207(a)(2).* These findings were sufficient to demonstrate a reasonable likelihood that Mr. R's representation of Appellant at trial would violate a statute designed to protect the integrity of government functions, including trial proceedings. Therefore, Mr. R's continued representation created "a serious potential for conflict," which provided a sufficient basis for the military judge to refuse Appellant's waiver of conflict-free representation. *Wheat, 486 U.S. at 164.* Accordingly, the decision by the military judge to disqualify counsel did not constitute an abuse of discretion, and did not deprive Appellant of his right to counsel of choice under the *Sixth Amendment. See id. at 159, 162-64.*

IV. DECISION

The decision of the Army Court of Criminal Appeals is affirmed.

APPENDIX B

IN THE CASE OF
UNITED STATES, Appellee

V.

Darnyell R. RHOADES
Specialist
U.S. Army, Appellant

ARMY 20040109

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

---

16 November 2006

UNPUBLISHED OPINION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:
s/ Malcolm H. Squires Jr.
MALCOLM H. SQUIRES, JR.
Clerk of Court

IN THE CASE OF
UNITED STATES, Appellee

V.

Darnyell R. RHOADES
Specialist
U.S. Army, Appellant

ARMY 20040109

NOTICE OF COURT-MARTIAL ORDER CORRECTION

IT IS ORDERED THAT, to reflect the true proceedings at the trial of the above-captioned case, GENERAL COURT-MARTIAL ORDER NUMBER 9, UNITED STATES ARMY INTELLIGENCE CENTER AND FORT HUACHUCA, FORT HUACHUCA ARIZONA 85613-7000, dated 19 November 2004,

IS CORRECTED AS FOLLOWS:

(1) TO reflect the correct date of the promulgating order as 21 October 2004.

(2) TO reflect that addtional Charge I should be an offense of Article 90.

DATE: 16 November 2006

FOR THE COURT:
s/ Malcolm H. Squires, JR.
MALCOLM H. SQUIRES, JR.
Clerk of Court